IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 13, 2009

WALFRIDO L. RODRIGUEZ v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2003-C-1613 Cheryl Blackburn, Judge

No. M2008-00778-CCA-R3-PC - Filed March 6, 2009

A Davidson County grand jury indicted the Petitioner, Walfrido L. Rodriguez, for first degree murder and aggravated assault. A Davidson County jury convicted the Petitioner of one count of second degree murder and one count of aggravated assault, and the trial court imposed an effective sentence of twenty-two years. This Court affirmed the Petitioner's convictions on direct appeal. The Petitioner then filed a post-conviction petition claiming that he received the ineffective assistance of counsel. The post-conviction court denied relief, and the Petitioner now appeals, claiming that his trial counsel was ineffective because she failed to secure the testimony of several witnesses. After a thorough review of the record and the applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES, and JERRY L. SMITH, JJ., joined.

Russell F. Thomas, Nashville, Tennessee, for the Appellant, Walfrido L. Rodriguez.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION
I. Facts

On direct appeal, this Court set forth the following factual summary:

> The [Petitioner]'s trial for the first degree murder of Luis Negron Sierra and for the aggravated assault of Abraham Torres featured little factual controversy. The [Petitioner] and victim Sierra (hereinafter referred to as the victim) had been friends and coworkers. Mr. Torres is the victim's stepson and was 16 years old on April 3,

2003, the date of the victim's homicide. The victim was 24 years old on that date, and the [Petitioner] was 40 years old.

The state theorized an intentional, premeditated killing of the victim based upon the decision of Lillian Torres, the [Petitioner]'s girlfriend, to leave the [Petitioner] and reside with the victim, his wife, and family and upon the victim's intervention in an argument between Ms. Torres and the [Petitioner] in January 2003. On April 3, a car driven somewhat erratically by David Noel Ramos Gonzalez, an acquaintance of both the victim and the [Petitioner], proceeded onto a park playground near the victim's apartment. The car stopped at a swing set where the victim and Mr. Torres were playing with the victim's toddler daughter. The [Petitioner] emerged from the passenger side of the car, and according to Mr. Torres, the victim, who had no gun on his person, "put his hands up in the air" in a gesture of "What's up?" When the victim and the [Petitioner] were two or three feet apart, the [Petitioner] shot two or three times. Mr. Torres testified the [Petitioner] pointed the gun at him. Mr. Torres and the child fled, and the victim ran a few yards before collapsing with a lethal wound to his lung and a vital blood vein and artery. The [Petitioner] returned to the car, and Mr. Gonzalez drove away.

By all accounts, the [Petitioner] surrendered to law enforcement officers several minutes later. He walked to a sheriff's department training center and stated that he wished to surrender for shooting another man.

At trial, the [Petitioner] testified that he shot the victim in self-defense. He testified that only minor friction developed between him and the victim over the [Petitioner]'s January argument with Lillian Torres and that the friction had been resolved. He believed, however, that the victim developed animosity toward the [Petitioner] because of the victim's ill feelings toward Mr. Gonzalez. The [Petitioner] testified that the victim had hired Mr. Gonzalez to fix the victim's car, but the victim became angry when Mr. Gonzalez botched the repair job and damaged the vehicle's crankshaft. Sometime later, Mr. Gonzalez and his wife and child began residing with the [Petitioner] in the [Petitioner]'s house. The [Petitioner] testified that the victim remained hostile toward Mr. Gonzalez because he had not paid for a new crankshaft and that, at one point, the victim asked the [Petitioner] to let him come to the [Petitioner]'s house one night and take the Gonzalez family "away." The [Petitioner] testified that he refused and ordered the victim out of his house. The [Petitioner] said that, although he and the victim remained friends after this incident, they were never again close.

One morning, near the first of April, the [Petitioner] discovered that someone had broken out his car windows the preceding night. The [Petitioner] suspected the victim because he found part of a golf club that he recognized as belonging to Abraham Torres or one of his friends. By this time, a man named Juan Arredonda

Buenida was residing in the [Petitioner]'s house, and the [Petitioner] asked Mr. Buenida to take the car to a car wash to clean it up. The [Petitioner] testified that Mr. Buenida, who was at the car wash, called the [Petitioner] and told him that the victim and his sons had accosted him with a gun, beat him, and damaged the [Petitioner]'s car. The [Petitioner] testified that one of his car doors had been bent backwards and sprung. He testified that he became fearful after this incident and purchased a handgun from a friend.

The [Petitioner] testified that, in the next few days, he became more nervous and had difficulty sleeping. He thought about going to see the victim to resolve the friction. On April 3, he rode around with Mr. Gonzalez. Mr. Gonzalez encouraged the [Petitioner] to see the victim before Mr. Gonzalez left for work; otherwise, Mr. Gonzalez could not take the [Petitioner] to see the victim until late that night. Mr. Gonzalez insisted that the [Petitioner] take the handgun, and although the [Petitioner] refused, Mr. Gonzalez went into the house and obtained the gun.

The men stopped at a flea market on the way to the victim's apartment because the [Petitioner] wanted to buy a rug. Instead, he bought a straight razor because it was a bargain and because he used a straight razor for shaving. When they arrived at the victim's neighborhood, Mr. Gonzalez saw the victim at the swing set in the park and drove erratically in that direction. The [Petitioner] testified that when he got out of the car, the victim came toward him taking long steps, making "big gestures," and describing the [Petitioner] in profane terms. As the victim approached, the [Petitioner] saw that the victim had his hand inside his shirt, and Mr. Gonzalez yelled that the victim had a gun. The [Petitioner] testified that he retreated to get in the car and leave, but Mr. Gonzalez "stretched out" the gun to him and said, "It's ready." When the [Petitioner] saw the victim nearly upon him, he fired three or four times. The victim and Mr. Torres ran, and the [Petitioner] got back in the car, thinking that he had not hit the victim. As Mr. Gonzalez was driving away, the [Petitioner] saw the victim fall to the ground and testified that, then, "[t]he whole world caved in on me." Several minutes later, despite Mr. Gonzalez's objections, the [Petitioner] surrendered to the police.

Mr. Buenida testified in the [Petitioner]'s behalf about being assaulted at the car wash. He testified that when he got out of the [Petitioner]'s car at the car wash, two men accosted and pistol-whipped him. Mr. Buenida heard the victim say, "It's not him" and then saw the victim sitting beside them in his car. Mr. Buenida essentially opined that, despite his being a much smaller man than the [Petitioner], the victim and his associates could have mistaken him for the [Petitioner] because Mr. Buenida wore the [Petitioner]'s jacket.

The jury convicted the [Petitioner] of the second degree murder of the victim and of the aggravated assault of Mr. Torres.

State v. Rodriguez, No. M2005-01351-CCA-R3-CD, 2006 WL 1626845, *1-2 (Tenn. Crim. App., at Nashville, June 7, 2006), *perm. app. denied* (Tenn. Oct. 30, 2006). The trial court sentenced the Petitioner to twenty-two years. *Id.* This Court affirmed the Petitioner's convictions and sentence. *Id.* at *3. The Petitioner subsequently filed a petition for post-conviction relief, and an amended petition, claiming that, among other things, his trial counsel was ineffective for delaying her investigation of potential witnesses, making her unable to secure their testimony.

The post-conviction court held a hearing on the Petitioner's request for post-conviction relief wherein the following evidence was presented: the Petitioner testified he had a preliminary hearing about thirty days after he was arrested. He met with his attorney, who advised him to plead guilty, an hour before the preliminary hearing. The Petitioner was assigned and met with trial counsel ("Counsel") several months after the preliminary hearing.[1] The Petitioner said that he was also assigned an investigator.

The Petitioner recalled that, at trial, he testified his actions were in self-defense. The Petitioner said that he fixed the victim's car and that he and the victim had been close friends for "a long period of time." The victim introduced the Petitioner to David Noel, the Petitioner's co-defendant, who lived with the Petitioner temporarily.

The Petitioner then discussed several incidents involving himself and the victim that the Petitioner claimed supported his self-defense claim. Describing one such incident, the Petitioner said that he and several of his friends celebrated New Year's Eve 2001 at the Petitioner's home. Around 5:00 a.m., the Petitioner prepared to drive his guests home to their respective houses. However, according to the Petitioner, as he and his guests prepared to leave, the victim and several other unidentified individuals attacked the Petitioner and "messed [with]" at least one car on the Petitioner's property. The Petitioner recalled a second incident, which occurred after New Year's Eve 2001, where the victim again vandalized the Petitioner's car. The Petitioner opined that "everything [was] breaking down" as a result of that vandalism.

In another incident not involving the Petitioner, the Petitioner said that the victim attacked a man named Juan Arradondo. He said the victim "beat [Arradondo] up with [a] gun and hit him in the head with a gun or something" while at a car wash. The Petitioner explained that the animosity between Arradondo and the victim arose when Arradondo failed to correctly fix the victim's car.

Finally, the Petitioner testified that, on one occasion, the victim drove past the Petitioner's house flashing lights and firing a gun toward the house.

The Petitioner said that, while several people saw the victim vandalize the cars, the investigator had trouble finding these people. The Petitioner did not know the witness's first and

[1] Two attorneys represented the Petitioner at trial, but only one of the attorneys testified at the post-conviction hearing.

last names. When asked about their names, he said, "Like Patricia, Tada, Robert, the father, the mother, aunt, Robert's mother-in-law, Patricia, his wife, a couple of people." He then said, "Sergio is the principal who can't connect him with the other people by – I don't know." The Petitioner said that the witnesses were afraid to testify because they feared being retaliated against for their testimony.

The Petitioner testified he met with Counsel six or seven times before trial. He told Counsel about his and the victim's prior interactions, and he asked Counsel for the transcript of his discovery hearing. The Petitioner said he and Counsel discussed their trial strategy, and he followed her recommendations. He insisted that, as Counsel directed, he testified truthfully at his trial.

On cross-examination, the Petitioner clarified that, on New Year's Eve, the victim did not damage the Petitioner's car. He also said at least six people saw the victim damage the cars at the Petitioner's house, but they would not testify. The Petitioner also acknowledged both he and Arradondo testified at trial about the victim damaging the cars. The Petitioner also conceded he testified at trial about the car driving past his house with the flashing lights. He stated that he wanted more witnesses to testify about these events.

Counsel testified that she had been practicing criminal defense work for ten-and-a-half years when she was assigned the Petitioner's case. She used two investigators on the case, and they found Arradondo, who testified at the Petitioner's trial. Counsel said she met on an almost daily basis with the Petitioner during the weeks leading up to his trial. She also met with him five to ten times before that. Counsel said that she could not find the records to link the victim to a murder in Puerto Rico and that she did not think the Petitioner testifying about the victim's prior criminal activity would have been admitted.

On cross-examination, Counsel stated that she took over the case after the indictment and arraignment. She said that written discovery had been provided at that point and that she did not know whether the discovery was sent to the Petitioner. Counsel said the Petitioner made a statement in the case, and they did not file a motion to suppress that statement. Counsel explained that, although she discussed the victim's prior criminal activity with the investigator and the Petitioner, she did not have any evidence of that activity. Counsel said that she and the Petitioner were "very close mouthed" about their trial strategy. Finally, she testified that her interviews with other witnesses did not yield information relevant to the self-defense theory.

After hearing the evidence presented, the post-conviction court denied the petition for post-conviction relief. It is from that judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner claims that he received the ineffective assistance of counsel because Counsel failed to secure the testimony of several witnesses to the Petitioner and victim's prior disagreements.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688 (1984)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland,* 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy

and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

In its order, the post-conviction court cited the Petitioner's failure to introduce at the post-conviction hearing any of the witnesses he claimed Counsel failed to call at trial. The court said, "This Court is not permitted to speculate on what a witness' testimony might have been if introduced by counsel; thus, Petitioner has failed to establish by clear and convincing evidence that he was prejudiced by trial counsel's alleged failure to call additional witnesses to testify at trial."

We conclude that the Petitioner has failed to show that Counsel was deficient. "[W]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). The Petitioner argues that Counsel should have found additional witnesses to testify about the prior disagreements between himself and the victim. However, the Petitioner could not fully identify these witnesses, and he acknowledged the witnesses were afraid to testify at trial. Without their testimony at the post-conviction hearing, the Petitioner has not proven that Counsel was deficient in not calling the witnesses to testify at trial. The Petitioner has not shown by a preponderance of the evidence that Counsel was deficient. *See Baxter*, 523 S.W.2d at 936 and *Hicks*, 983 S.W.2d 240, 245. Thus, the Petitioner is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that the Petitioner did not receive the ineffective assistance of counsel, and we affirm the post-conviction court's judgment.

ROBERT W. WEDEMEYER, JUDGE